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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1952

No. 557

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PAN AMERICAN PETROLEUM & TRANSPORT COMPANY,
*Petitioner,*

V.

SEABOARD AIR LINE RAILROAD COMPANY,
*Respondent.*

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**Petition For Writ Of Certiorari To United States Court Of Appeals Fifth Circuit And Brief In Support Thereof**

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Julian C. Sipple,
26 Bryan Street, East,
Savannah, Georgia.

T. M. Cunningham,
26 Bryan Street, East,
Savannah, Georgia.

A. R. Lawton,
26 Bryan Street, East,
Savannah, Georgia.

Herbert P. Reid,
76 Beaver Street,
New York, N. Y.

*Proctors for Petitioner.*

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**vs.**

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**Respondent.**

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## Petition for Certiorari

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TO the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Pan American Petroleum & Transport Company (hereinafter called "Pan American"), respectfully petitions that writ of certiorari may issue to the United States Court of Appeals for the Fifth Circuit to bring up the record from and to review the judgment of that Court rendered November 15, 1952, on the libel of Seaboard Air Line Railroad Company (hereinafter called "Seaboard") vs. S.S. "Pan Maryland" and Pan American, and in the cross libel of Pan American vs. Seaboard (No. 14,179); and that judgment on the said libel and cross libel may be reviewed

and reversed, and in support of the petition, respectfully shows:

**Short Statement of Matter Involved.**

S.S. "Pan Maryland" collided with the South abutment of the draw span of Seaboard's bridge over the Savannah River, doing damage to the bridge and the Steamship. Seaboard brought a libel against S.S. "Pan Maryland" and its owner, Pan American, for the damage to the bridge, alleging that the collision was caused by negligent navigation of the S.S. "Pan Maryland". Pan American cross-libeled Seaboard, alleging that the bridge was an unreasonable obstruction of navigation and an unlawful structure, and that Seaboard was liable for the damage to the ship and that the ship was not negligently navigated. The libel and cross-libel were consolidated and heard together, the question of damages being reserved for future determination. The District Court held that the Steamship was without fault, that the ship took a sudden and irresistible sheer due to the shoaling in the channel, that the bridge was an unreasonable obstruction to navigation and an unlawful structure, and was one of the causes of the collision, and held Seaboard liable for the damages to the ship. The Court of Appeals held that the bridge was not an unlawful structure and that the sole cause of the damage was the negligent navigation of the ship and gave judgment accordingly against the Steamship and Pan American. Pan American duly petitioned for a rehearing which was denied December 12, 1952. The case is reported in 199 F. (2d) 761.

**Jurisdictional Statement.**

This Court has jurisdiction to grant the writ of

certiorari under U.S. Code, Title 28, §347 (a), and Rule 38 of the Supreme Court Rules.

**Questions relied on for the allowance of the Writ.**

There are four separate grounds on which the writ is sought.

1. The Court of Appeals erred in holding Seaboard's bridge was not, "an unlawful structure" (R. 634), and in not holding that it was "an unlawful structure;" and also in not holding the bridge was in point of fact an unreasonable obstruction of navigation. These are pure questions of law, and involve the application and interpretation of the "Bridge" Acts of Congress.

2. The Court of Appeals erred in holding that Seaboard was not responsible for the shoaling of the channel in the approaches to the bridge (R. 632). This was the cause of the ship taking a sudden and irresistible sheer which was one of the main contributing factors in the collision. There is no dispute in the evidence as to the facts of this matter.

3. On the question of the negligent navigation of the ship, the Court of Appeals erred in that it completely ignored the Findings of Fact of the District Judge, who heard the evidence and saw the witnesses. The Court of Appeals made its own Findings of Fact (R. 628), just as though it was the original trier of the facts. The Court of Appeals violated the rule which prevails in all the Judicial Circuits (including the Fifth) that the Findings of Fact of the District Judge who heard the evidence and saw the witnesses must as a matter of law be followed unless clearly

erroneous. The facts on which the Court of Appeals rested its opinion are contrary to the evidence.

4. At the least, even were it conceded that the ship was negligently navigated, the bridge being an unlawful structure or an unreasonable obstruction of navigation, the Court of Appeals should have held that there was mutual fault, in which event the damages would be divided according to the rules in admiralty applicable to a collision between two or more vessels.

## THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

**1. The bridge was an unreasonable obstruction of navigation and an unlawful structure.**

**(a) The Bridge.**

The bridge was constructed about 1900 under a Special Act of Congress and reconstructed in 1908 (R. 491) with a draw span 116 feet wide. The river at this point runs upstream East to West and the bridge crosses the river from the City of Savannah side South to North. The draw span is on the extreme South end of the bridge and the South abutment on which the span rests is near the South shore. The bridge is in a bend in the channel (R. 488).

**(b) Changed Conditions.**

Since the bridge was built several large industries were located upstream (R. 445); (Finding No. 4 District Judge, R. 65); Letter Chief of Engineers to Secretary of War (R. 503). These large industries are supplied by deep draft ocean vessels (R. 446). When the bridge was reconstructed in 1908 there was no improved channel above the bridge. In 1921 the

depth of the channel above the bridge was increased to 21 feet (R. 440); at the time of this collision it was 30 feet.

**(c) The bridge was a hazard and an unreasonable obstruction to navigation.**

The evidence to this fact is overwhelming. The agitation on this subject began as early as 1934 (R. 211, 407). Robert W. Groves, President, Savannah Port Authority (R. 211-216); Spencer (R. 223); Brown (R.283); minutes of public hearing held Aug. 8, 1939, by U.S. District Engineer, P.A. Ex. 12 (R. 417-491); minutes meeting October 1936 conducted by Savannah Port Authority at which Seaboard officials were present (R.212); minutes of public hearing before District Engineer Feb. 25, 1941 (R. 512); letter from Chief Engineer of Seaboard to U.S. District Engineer Aug. 6, 1939, admitting the necessity of changing the width of the draw span to 200 feet and changing the location of the draw span (R. 488). Senate Doc. No. 39—71st Congress (R. 443); Report of Board of Engineers to Secty. of War Feb. 12, 1934, (R. 443).

**(d) The application of Seaboard to Secretary of War for permission to widen the draw span to 200 feet and to change the location of the draw span and the subsequent orders of the Secretary of War.**

(1) April 23, 1937, Seaboard made application to the Secretary of War to reconstruct the bridge so as to provide a draw span of 200 feet and to relocate the draw span (R. 212, 442). This application was in response to the frequent protests of the maritime interests at Savannah (P.A. Ex. 4; R. 408); Groves (R.212); Rhodes (R.312), and the letter of April 2, 1937 from the District Engineer that he proposed to have a hearing on the subject April 11, 1937 (R.407).

(2) June 21, 1937 the Acting Secretary of War approved the plans of Seaboard and authorized the work to proceed, the actual work to be started in eight (8) months and completed in three years after receipt of the instrument of approval (R.491). In February 1938 Seaboard was granted by the War Department an extension of time to June 15, 1939, to begin the work, but the time for completion of the work was not extended (R. 213, 446). 10 months after the extension was granted the District Engineer complained to Seaboard about its failure to prepare plans (R.411). And in the following month the District Engineer on account of Seaboard's procrastination gave consideration to prosecuting the Seaboard in the Courts (R. 415, 416).

(3) October 17, 1939, the Secretary of War issued his order to Seaboard denouncing the bridge as an unreasonable obstruction to free navigation and directing the draw span to be increased to 200 feet in width and placed in a position normal to the axis of the channel, the work to be completed within 2 years and 6 months (April 1942), (R.38).

(4) June 21, 1940, the Truman-Hobbs Bridge Act was passed. This Act was first introduced in 1937 (R.180) and passed in July 1939, but was vetoed. It was passed a second time and again vetoed and Congress passed the Act over the veto on June 21, 1940, (R. 181, 182, 402, 403, 424). September 2, 1940, the Attorney General advised the Secretary of War: "Since the Receivers are unwilling to abide by the order of October 17, 1939, and since it appears to me to be futile to attempt to enforce the order, I advise that you withdraw it and proceed to the issuance of

a new order under the Act of June 21, 1940", (R. 401). Acting on this advice of the Attorney General, the Secretary of War December 14, 1940, ordered that his order of October 17, 1939, "is hereby withdrawn," (R.399).

(5) Pursuant to a public hearing held February 7, 1941, (R.519), the District Engineer at Savannah May 19, 1941, recommended to the Chief of Engineers "that proper steps be taken to replace this bridge with a new one as soon as practicable," (R.591). June 21, 1941, because of war conditions, the Chief of Engineers decided at that time not to issue any order (R. 214, 342, 343). February 13. 1946, the Secretary of War issued his second order to the effect that the bridge was an unreasonable obstruction to free navigation due to inadequate clearance through the draw span of said bridge and ordered Seaboard to provide a draw span with a horizontal clearance of 200 feet normal to the channel (R.40). June 26, 1950, Seaboard was advised by the War Department of the final approval of plans for the reconstruction of the bridge (R.172).

**(e) The Acts of Congress relating to this bridge.**

These Acts are printed in the Appendix to the brief filed in support of the petition.

(1) The bridge was originally constructed under the Special Act of Congress of February 2, 1899 (30 Stat. 813). This Act provided in Section 2 "that the bridge shall be so constructed, by draw span or otherwise, that a free and unobstructed passage may be secured to all vessels and other water craft navigating said river *** and that the said bridge shall be at all times so kept and managed as to offer reason-

able and proper means for the passage of vessels through or under said bridge."

Section 3 provides that the bridge so built shall be a lawful structure, and Section 6 reserves the right to amend the Act.

(2) The order of February 13, 1946, of the Secretary of War to reconstruct the bridge was issued under the Act of June 21, 1940, (54 Stat. 497; 33 U.S.C.A. Sections 511-523). The main purpose of this Act was to allocate the cost of reconstructing railroad bridges between the United States and the owners of railroad bridges. This Act contains a provision which is neither in the Special Act under which this bridge was built nor in River and Harbor Act of March 3, 1899. This provision reads:

> *"Obstruction of Navigation.* Section 2. No bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States."

The Act of March 3, 1899, provided in Section 18 that whenever the Secretary of War passed an order to alter a bridge that he "shall prescribe in each case a reasonable time within which to make them." The Truman-Hobbs Act did not provide that the Secretary should prescribe the time within which the work should be completed and, therefore, the order of February 13, 1946, to reconstruct the bridge did not carry any provision with respect to the time of the completion of the work.

**(f) The obstruction of navigation through the bridge would have been removed long ago but for the procrastination of Seaboard.**

Seaboard, in recognition that the bridge was in point of fact an obstruction to navigation, voluntarily agreed April 1937 to reconstruct the bridge and requested authority to do so, (statement of Faucette, Chief Engineer of Seaboard (R.408; Groves R.212; Rhodes R. 312). June 21, 1937, the authority was granted and the plans approved and the work was ordered to be begun within 8 months and completed in three years (June 21, 1940), (R. 491). This order was never repealed and if it had been complied with the bridge would have been completed at or before the Truman-Hobbs Act was passed. In December 1938 the Receiver wrote the District Engineer indicating that the Receivers did not plan to delay the begining of the work (R.412).

It is obvious that Seaboard was delaying, on account of the pendency of the Truman-Hobbs legislation. May 6, 1939, District Engineer wrote to his senior Engineer (R.496) that Seaboard had obtained bids to do the work but "did not wish to lose the benefit of this legislation." At the public hearing on the bridge August 8, 1939, Mr. Cocke, General Counsel of the Receivers of Seaboard, was present and called attention to the pendency of this legislation (R.424). The Act was first passed in July 1939 but failed to receive the approval of the President. It was passed a second time and vetoed by the President and then passed June 21, 1940, over the veto (R. 402, 403). Simpson, Chief Engineer of Seaboard, testified that it requested the extension of time to begin the work on account of the pendency of the Truman-Hobbs legislation (R.183).

Seaboard did nothing in response to the order of the Secretary of War of October 17, 1939. The last

order was passed on February 13, 1946. Four years and 4 months afterwards the War Department finally approved the plans. As early as 1934 the maritime interests of the port complained of the hazardous conditions of the bridge and continually pressed for action.

The Court of Appeals in its opinion (R.634) conceded "The record does show that there have been long standing complaints about the condition of the bridge and *that the correction of the conditions obstructing navigation on the river has been long overdue.*" (Emphasis ours).

The delay was profitable to Seaboard. The cost of the bridge was allocated: to the United States, $1,564,000, and to the Seaboard, $168,000, (Pan Am. Ex. 5, R. 409).

**(g) Our Contentions on this Question.**

(1) The orders of the Secretary of War became effective from their date and continued in effect no matter how long a time the bridge owner might take in complying with the order, or if the bridge owner never complied with the order. From the date the order was signed, the risks were the risks of the Seaboard and not of the public.

(2) The application of the Seaboard to the Secretary of War of April 23, 1937, to reconstruct the bridge was an admission that the bridge was an unreasonable obstruction of navigation, and Seaboard is estopped to deny this fact.

(3) Seaboard cannot take advantage of its procrastination. During the delay, the risk was the Seaboard's and not the risk of the users of the navigable waters.

(4) Section 2 of the Truman-Hobbs Act provides: "No bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States." The words "at any time" give point to the contention that when the Secretary of War declared the bridge an unreasonable obstruction, it continued an unreasonable obstruction until the work was completed in accordance with the orders of the Secretary of War.

(5) Although the bridge was a lawful structure when built, it did not remain a lawful structure on account of changed conditions and the increased demands of commerce and navigation. The duty is continuing to meet these new altered conditions.

(6) Under the evidence in this case and the admission of the Seaboard by its application of April 23, 1937, the bridge was an unreasonable obstruction to navigation, and, therefore it was an unlawful structure.

(7) The Bridge Acts are important Federal legislation in which the commerce and navigation of the country is vitally interested. This case involves their application and construction and the questions raised in this petition should be settled by this Court.

**2. The Channel was Shoal in the Approach to the Bridge and Seaboard was responsible for this Condition.**

The fathometer soundings of the channel approaching the bridge (Pan. Am. Ex. 41 in specie) were made April 4, 1950 or two weeks before the collision (R.235). A cross mark on the first sheet shows the location of the bridge and the depth 26 feet (R.235). 1,000 feet below the bridge the depth is 30 or 31 feet. The chan-

nel becomes shallower as the bridge is approached. As you go through the bridge the depth is about 26 feet. There is a shelf there (R.236). The last dredging in this locality was two thousand feet downstream in 1949 (R.236). The District Judge found this shoal condition existed and that it was a hazard (R. 69, 70), and that the Chief Engineer of Seaboard had written to the U. S. District Engineer, June 18, 1946, that because of the insufficient penetration into the river of the bridge pier footings, that it would be very unwise to attempt any dredging at this point before the new bridge is constructed (R.45). The Court of Appeals stated in its findings of fact: "It was established at the time of the collision the depth of the water below the bridge was 32 feet" (R.630). This would give the impression that this was the depth 200 feet from the bridge where the ship took the sudden and irresistible sheer which was one of the principal causes of the collision. The channel depth elsewhere was immaterial. If the Court of Appeals had reference to the place where the sheer took place, the statement is contrary to the evidence. The concentric circles on the fathometer chart are 333 feet apart (R.238). The first page of the chart reading from left to right is approaching the bridge upstream and this clearly shows the depth as stated by the witness about 26 feet. The tide was neap, a rise of 5 feet (R.285).

**3. The Court of Appeals found contrary to the evidence that the ship was negligently navigated.**

(a) The Court of Appeals ignored the findings of fact of the District Judge on this question (Findings of Fact, Nos. 19-25; R. 70-73), contrary to the practice in all the Judicial Circuits, including the 5th.

The rule is that the Court of Appeals must follow the findings of fact of the District Judge who saw and heard the witnesses, unless they are clearly erroneous. This is an aggravated case of a clear departure from this universal rule.

**(b) The Angle of the Draw Span to the Channel.**

It is variously expressed by the witnesses that a vessel approaching the draw span would have to come in at an angle, that the span was not in a direct line with the channel, and that the bridge was at a bend in the channel. (Groves, (R. 212, 215); Brown (R. 282); Moura (R.269); Savannah Port Authority (R. 439); Chief Engineer Seaboard (R.439).

**(c) The Ship.**

She was an oil tanker fully loaded—440 ft. long, 66.8 ft. beam, gross tonnage 7701 (R. 20, 31); draft 28.3 feet (R. 245, 363).

**(d) The evidence of the witness Ahern as to the approach to the draw span.**

The Court of Appeals adopted the evidence of the witness Ahern. He is a retired Admiral in the Coast Guard. Some years ago he commanded a Coast Guard Cutter at Savannah, which was a boat 200 feet in length. *He had never taken any ship through this bridge* (R. 141, 142). He was retained by Seaboard for a fee to take observations at the bridge and to testify in this case (R. 121, 122). His testimony was that the proper manner for a ship to approach the bridge coming upstream was in a straight line with the draw span beginning at a distance of 3/8 of a mile from the bridge, and that from his observation of eight ships that is the course they took

(R.123), and he drew a straight red line on a chart (Seaboard Ex. 1, "In Specie") which he referred to as the base course a ship should take. Ahern was testifying from a deposition of the Pilot Clark and the mate of the vessel (R.124). The deposition of Clark was not put in evidence. This witness when he testified had not heard the evidence of the Pan American witnesses in this case.

**(e) The evidence of Pan American's witnesses as to the approach to the draw span.**

The witness Groves, who was President of Savannah Port Authority, testified contrary to the evidence of Ahern as to the approach to the bridge (R. 217-219).

Captain Spencer, Manager of the Atlantic Towing Company, a disinterested witness with 40 years experience on the Savannah River (R.223), testified that the proper course for a ship the size of "Pan Maryland" would be slightly North of mid channel, as shown on Pan American's Ex. No. 40 "In Specie" and that when within probably two lengths of the ship she would begin to haul to South to get in line with the channel (R.224). Spencer testified further that the approach to the bridge as testified to by Ahern was not the usual course; that it was incorrect, and that a ship would not follow Ahern's course (R.225).

Brown, a Savannah Pilot, testified the correct course to take was as shown on Pan American's Ex. 40 "In Specie", that is the course usually followed, and at about 1,000 to 1,500 feet you drop over to the left. He had taken many ships through this bridge (R.284).

Captain Moura was on the bridge of the "Pan Maryland." He had been through this bridge on Pan American tankers about 30 round trips (R.268). The "Pan Maryland" took the usual and normal course on this occasion, that is, the Northern quarter of the channel and at a distance of approximately 1,000 feet below the bridge the ship was swung gradually to the left to bring it in line with the span, and when she completed the swing she was about 200 to 300 feet from the bridge (R.269). This witness further testified that when the "Pan Maryland" went through the bridge August 3, 1951, she took the same course in approaching the bridge as she did on the day of this accident (R.274), yet the witness Ahern testified that the "Pan Maryland" on August 3, 1951, took a straight course from 3/8 of a mile from the bridge (R.128, 129). Captain Moura testified (R.274) that if his ship had taken the course stated by Ahern her stern would probably have gone aground. This is obvious from the Chart (Pan American's Ex. No. 40, "In Specie") and the same Chart (Seaboard's Ex. 3 In Specie). 3/8 of a mile = 1,980 feet and the length of the ship 440 feet = 2,420 feet. If a straight line is drawn from the middle of the bridge span 2,420 feet it would put the ship on the very South side of the channel very near shoal water. The channel is 400 feet wide and the range of the channel is North of the bridge span.

Casey, Chief Mate of the ship, testified the normal approach to the draw span was the right hand side of the channel, and that a ship works from the right to the left and straightens out when partly in the draw and this was the course "Pan Maryland" took on this occasion (R. 361, 363, 371, 383). This witness

had been through this bridge with fully loaded tankers many times (R.361).

Pilot Clark (who was navigating the ship) testified that he approached the bridge a little to the right of the center of the channel, as shown on the red line on the Chart (Pan American Ex. 40 "In Specie").

Now here were 6 witnesses whose testimony was directly contradictory of the testimony of Ahern. Groves, Spencer and Brown were disinterested witnesses. Clark, Moura and Casey were on the ship. All of the Pan American's witnesses were experienced men. It is reversible error for the Court of Appeals to adopt Ahern's testimony in preference to the credible testimony of six other witnesses. Certainly the District Judge's Conclusions were not "clearly erroneous." With a large, heavy draft ship, and a narrow draw span, navigators would naturally prefer a straight course if that were safe and prudent. Ahern's observations were taken from the bridge (R. 143). The channel is 400 feet wide (Pan Am. Ex 3 (a) "In Specie"). Standing where he was, he might think that a ship 2000 feet away was headed directly for the center of the draw span, especially if the "wish was father to the thought." Moreover, the South line of the channel runs very near the North abutment of the span. If a ship headed directly for the center of the draw span 2,000 feet away, she would be at target 109 on the chart and she would be out of the channel. This is shown plainly on the chart (Seaboard's Ex. No. 3, and Pan American's Ex. No. 40—both "In Specie").

As a matter of fact the manner in which the "Pan Maryland" approached the bridge had nothing to do with the collision. The event which caused the collision

(the sudden sheering of the ship) occurred when the ship was only 200 feet from the bridge and the vessel was pretty well lined up to go through the bridge (R. 269, 362).

**(f) The maneuvers of the ship.**

Clark, the pilot of the ship, an experienced pilot of 32 years experience (R.243), testified the course he followed in approaching the bridge was a little bit to the right of the center of the channel, and when he reached target 108 (which is 1,000 feet from the bridge), he "began to drag the haul down toward the opening of the span by starting the ship to swing to the left and check her a little bit, swing a little bit more to left and check her a little bit" (R.245). When within 250 feet of the draw, the ship was pretty well lined up to go through the draw and she began smelling the bottom (R. 246, 247). In other parts of his testimony he refers to the sheer of the ship (R. 248, 265). He was in an emergency (R. 262, 263). The ship had a tendency to go to the right and he had given a hard over left wheel to correct this tendency (R. 261). When the ship sheered the pilot put the wheel hard to the right. The ship would not respond, there was too much of a sheer, and then he ordered full speed ahead (R. 248-249). The pilot further testified he was proceeding slowly as usual (R. 256-261), that his experience was that a full speed ahead would give a greater pressure on the rudder and bring the vessel out of the sheer. He stated "that is his practical experience" (R. 262, 263), and that he thought this was the proper thing to do under the circumstances (R. 249). The vessel was too close and it was too much of a sheer (R.248). To the question of Counsel sug-

gesting that the anchor might have been thrown out and that full speed astern might have been given when the ship sheered, the pilot answered that the anchor could not have stopped the ship and that if he had resorted to these maneuvers the ship would have probably knocked the bridge down (R. 261-263). The pilot gave full speed astern when he saw the collision was inevitable, to break the force of the impact (R. 248).

Moura, the Captain of the ship, testified: "We were proceeding up the river in much the same manner we generally do *** and we were following, I would say, the Northern quarter of the channel to a distance of approximately 1,000 feet or so below the bridge *** from there on is a gradual swing to the left of port. This is to bring the ship in line with the span of the bridge *** Then by the time she completes the swing I would estimate that we are from 200 to 300 feet away from the bridge *** Now at this point you are generally on a line to pass through the span" (R.269).

**(g) The sudden sheer of the ship.**

The pilot testified that coming up the river the ship responded properly to her rudder (R.244). Captain Moura testified that about 250 feet of the bridge "at the time we were coming left to line up for this span and just about to steady the vessel to make the passage through the span when the ship sheered, and when a ship sheers, a ship sheers" (R.269). He testified that he meant by that term "sheers" "a turn that is unanticipated and unavoidable" (R.270), that a sheer is comparable to the skidding of an automobile, except that with an automobile about 4,000 pounds is involved, whereas with the vessel some 15 or 20,000

tons dead weight is involved (R.270). The pilot, immediately she began to sheer, gave her a hard right rudder. She did not come out of that sheer prior to hitting the bridge (R.270). Checking later the Captain "found a fair shoal of water in the approaches to the draw, and that the bridge does not properly line up with the channel." He said further "I think that it (the shoal water) had everything to do with the accident" (R.271). Captain Moura further testified as follows: "Then in lieu of just taking the left rudder off, he (the pilot) immediately gave the order hard right in an attempt to break the sheer, then the engines were run full speed ahead to check her swing. That also is in accordance with the principal of good seamanship. The reason you do that is because the thrust of the propeller against the rudder is the greatest steerage force that a ship can have, and you first try to change your heading by using your engines on a full ahead bell *** It must be a full bell to assert the greatest pressure on the rudder and I would say that this action of putting the wheel from left to right and to putting the engines full ahead was almost instantaneous" (R.276). The order for full speed astern was given just before the collision (R.271).

Casey, the Chief Mate, testified when the ship was about 200 feet from the bridge she took a sheer to the left and she did not come out of the sheer before the collision (R.363). The sheer was caused by the deep draft of the vessel, the vessel smelled or felt the bottom and that caused the sheer (R. 365, 366). She sheered to the left sharply when 200 feet from the bridge (R.372). The opinion of the witness was that when the sheer occurred the collision was inevitable whether

she reversed her engines or the engines went full speed ahead (R. 381, 382).

Brown, a Savannah Bar Pilot, testified: A vessel is more likely to sheer at the approach to the bridge on a neap tide, with a rise a little over 5 feet (R.285). "If she was sheering to the left certainly I would give her a right wheel" (R.286, 287). "Q. What order would you give for the propeller full ahead or reverse? A. You mean in close proximity to the bridge? Q. Yes. A. A full ahead would be the only thing to do. Q. Would that be for the purpose of getting better steerage? A. It would be for the purpose of breaking the sheer." (R.287).

**(h) The speed of the ship as she approached the draw.**

Casey testified the ship as it approached the bridge was proceeding at slow speed, which was proper (R. 362). The Pilot, Clark, testified "I was going slow ahead, a half ahead" (R.246). Spencer testified, "We have a maximum limit of four miles per hour. It is regulated by the authorities and that is about a proper speed to go through a bridge" (R.225).

**(i) The depth of the channel at the bridge compared to the draft of the ship was sufficient to account for the sheer.**

The draft of the ship was 28.3 feet. The fathometer soundings of April 4, 1950 (first sheet) shows the depth of the channel as the bridge is approached about 26 feet (Pan Am. Ex. 41 "In Specie"). The District Engineer's minimum depth of the channel from the sea to S.A.L. bridge dated April 12, 1950, shows the depth at the approach to the bridge varies

from 26 feet to 27 feet (Pan Am. Ex. 3 (a) "In Specie"). The Pilot Clark testified in response to questions from the Court, that he thought the sheer was due to the silt that comes down the river and that a lot of it accumulates there (R.254, 255).

**(j) The photographs taken by Pan American of S/S "Pan Maryland" as she approached the bridge on a subsequent occasion, October 4, 1950.**

This is Pan American's Ex. 42 "In Specie." There are 13 photographs which are intended to show the approach of the ship from 2,000 feet at intervals to and through the bridge and which show the drawspan. Particular attention is directed to Photo No. 6, which shows the ship 200 feet East of the span, where the sheer took place. This shows the ship was in close quarters with the span and that if the ship sheered at this point (as it unquestionably did) that the pilot was confronted with a grave emergency.

The tide, weather and wind conditions at the bridge were favorable to a safe passage through the bridge. The ship would have passed through safely but for the unavoidable sheer of the ship.

**(k) The errors in the decision of the Court of Appeals on this branch of the case are:**

(1) The adoption of Ahern's evidence against the credible evidence of 6 other witnesses, 3 of whom were disinterested.

(2) On the question of the sudden and unexpected sheer of the ship, about which there can be no dispute, the Court decides the case just as though this important fact did not exist.

(3) The ship approached the bridge in the customary way. There was nothing negligent about the approach.

(4) The approach to the bridge had nothing to do with the collision. The ship was practically in line with the draw span when the sheer occurred.

(5) The right rudder when the ship suddenly sheered to the left and the signal for full speed ahead were both proper according to all the evidence (except Ahern who was not present). The Court of Appeals disregarding wholly the indisputable evidence of three experienced navigators, substituted its own opinion (which was contrary to the evidence) as to how the ship should have been navigated in this emergency.

(6) There was an emergency, and contrary to the opinion of the Court there was no negligence preceding the emergency or after it. The order for full speed ahead was under the circumstances certainly not culpable negligence.

(7) The Court of Appeals should have decided that the ship was without fault.

(8) It is respectfully submitted that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

**4. Even if it were conceded that the ship was negligently navigated, the bridge being an unlawful structure or an unreasonable obstruction to navigation, the Court should have held that it was a case of mutual fault and that the damage should be divided.**

WHEREFORE, Petitioner prays that a writ of certiorari may be directed to the Court of Appeals, to

bring up the record in said consolidated case and to review the decision of that Court in said case, and that the judgment of the Court of Appeals therein may be reversed and set aside.

This 17th day of January, 1953.

Respectfully submitted,

Julian C. Sipple,
26 Bryan Street, East,
Savannah, Georgia.

T. M. Cunningham,
26 Bryan Street, East,
Savannah, Georgia.

A. R. Lawton,
26 Bryan Street, East,
Savannah, Georgia.

Herbert P. Reid,
76 Beaver Street,
New York, N. Y.

*Proctors for Petitioner.*

IN THE

SUPREME COURT OF THE UNITED STATES

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Pan American Petroleum & Transport Company,
*Petitioner,*

vs.

Seaboard Air Line Railroad Company,
*Respondent.*

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# BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1952

No.....

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**Pan American Petroleum & Transport Company,**
**Petitioner,**

**Vs.**

**Seaboard Air Line Railroad Company,**
**Respondent.**

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## Brief In Support of Petition for Certiorari

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## FOREWORD

We are mindful of the insistence of this Court on brevity in the Petition and the Brief, but the Petition is as long as it is because the Court of Appeals in its opinion completely ignores the findings of fact of the District Judge and decides the case contrary to the evidence; and in order to show the extent to which the Court of Appeals has gone in this respect it is necessary to state with particularity the evidence in the case. Also, in deciding the question whether the bridge was an unreasonable obstruction of navigation or an unlawful structure, the Court of Appeals refers

to only one isolated fact in this connection, when the decision of this question depends on a long series of events, which it was necessary to set out in the Petition.

The applicable parts of the Bridge Acts of Congress are set forth in the Appendix to this Brief.

## PART I

(Part I relates to the orders of the Secretary of War and Part II to the navigation of the ship).

### I

**IF THIS BRIDGE WAS AN UNREASONABLE OBSTRUCTION OF NAVIGATION OR AN UNLAWFUL STRUCTURE THERE WAS A PRESUMPTION OF NEGLIGENCE AGAINST SEABOARD. IN ORDER TO OVERCOME THIS PRESUMPTION SEABOARD WOULD HAVE TO SHOW THAT THE CONDITION OF THE BRIDGE COULD NOT HAVE CONTRIBUTED TO THE COLLISION.**

The rule is not merely that the burden is on Seaboard to show that the condition of the bridge *did not* contribute, but that it *could not* have contributed. The photographs in evidence show that the ship struck the bridge on the left hand side of the bow. The draw span was 116 feet when it should have been at least 200 feet. With 84 more feet in the draw span the collision would probably not have occurred.

This Court has decided this legal principle in the following cases:

*The Pennsylvania,* 19 Wall. 125; *Beldon v. Chase,* 150 U.S. 674; *U. S. v. St. Louis & Miss. Valley Transp. Co.,* 184 U.S. 247, 255.

See also: *South Carolina State H.W. Dept. v. U. S.*, 78 F. Supp. 598; and the well-considered case (decided by Judge Soper) *U. S. v. Norfolk-Berkley Bridge Corp.*, 29 F. (2d) 115.

The Court of Appeals did not follow these decisions.

## II

### THE BRIDGE ACTS

This bridge was built under the Special Act of February 2, 1899. Section 18 of the Act of March 3, 1899, being a general Act, applies to this bridge.

*Louisville Bridge Co. v. U. S.*, 242 U.S. 409, 424.

The Act of March 3, 1899, and the Act of June 21, 1940, (which are identical in this respect) provide that when the Secretary of War has reason to believe that the draw span of a bridge over navigable water is an unreasonable obstruction of navigation, *it shall be his duty* (after notice to the bridge owner and hearing) to give notice to the bridge owner to so alter the same "as to render navigation through or under it reasonably free, easy and unobstructed." The bridge owner is given the right of appeal to the Courts from the order of the Secretary of War. The Acts give the Secretary of War the power to enforce his orders by a criminal prosecution against the bridge owner. The orders of the Secretary of War of October 17, 1939, and February 3, 1946, were never appealed from by Seaboard.

Under both the Acts of 1899 and 1940 the plans for the alterations of the bridge had to be approved by the Secretary of War.

Under the Act of 1899 the Secretary of War when he issues his order to make the alterations is required "to prescribe in each case a reasonable time in which to make them." The Act of 1940 drops this provision and it should be noted that the order of October 1939 contained such provisions, but the order of 1946 does not contain any provision as to when the work shall commence or be completed.

The Special Act of 1899 under which the bridge was built provides: "The said bridge shall be at all times so kept and managed as to offer reasonable and proper means for the passage of vessels through or under said bridge."

The Truman-Hobbs Act (Act of 1940) expressly provided in Section 2 "No bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States."

We understand that the Courts could not abate as a nuisance a bridge across a navigable stream erected under an Act of Congress, *Miller v. Mayor of New York,* 109 U.S. 385; and that the decisions of the Secretary of War made within the scope of these Acts and pursuant to the procedure prescribed therein are not subject to judicial review, except in the manner stated in the Acts. *Union Bridge Co. v. U. S.,* 204 U.S. 364; *Monongahela Bridge Co. v. United States,* 216 U.S. 177; *U. S. v. Chandler-Dunbar Co.,* 229 U.S. 53; *Greenleaf Lbr. Co. v. Garrison,* 237 U.S. 251.

## III

**THE ORDERS OF THE SECRETARY OF WAR THAT THE BRIDGE IS AN UNREASONABLE OBSTRUCTION OF NAVIGATION TAKE EFFECT WHEN THEY ARE**

**ISSUED AND CONTINUE IN EFFECT UNTIL THE ALTERATIONS ARE MADE AS REQUIRED BY THE ORDER.**

The orders are in two parts, (1) a pronouncement that the bridge is an unreasonable obstruction of navigation, and (2) that the bridge owner shall make the designated alteration to remove the obstruction.

The order goes into effect the date it is issued, and the bridge thereupon, ipso facto, becomes an unlawful structure. If the pronouncement that the bridge unreasonably obstructs navigation, does not become effective on the date it was issued, when does it become effective? Necessarily this part of the order must continue in effect until the alterations are made. When the alterations are made and not before does this part of the order become "functus officio". Seaboard argues that it could not make the alterations required by the orders until the plans and specifications for the new bridge are approved by the Secretary of War and, therefore, in the meantime, Seaboard not being in default, the bridge is not an unreasonable obstruction of navigation and an unlawful structure. There is nothing in the orders of the Secretary of War or in the Bridge Acts which would permit such an interpretation. The Truman-Hobbs Act (Act of 1940) expressly provides that "No bridge shall at any time unreasonably obstruct, etc."; therefore, when the Secretary of War pronounces the bridge an unreasonable obstruction, it then and there becomes an unlawful structure.

The Court of Appeals in its decision of this branch of the case considered only the order of the Secretary of War of February 13, 1946, and the fact that not

until June 26, 1950, was Seaboard advised by the Department of the final approval of the plans, which was 2 months after this accident happened. On these facts the Court of Appeals held that when the accident happened the bridge was not an unlawful structure (R.634). This seems to us a perfect example of a non-sequitur. The question of whether or not Seaboard was in default has nothing whatever to do with the fact that the bridge was an unlawful structure when the accident happened. In the natural course of events it would take considerable time for Seaboard after the approval of the plans to actually build the new bridge. The argument of Seaboard and the decision of the Court of Appeals carried to their logical conclusion would mean that the order of the Secretary as to the bridge being an unreasonable structure would remain dormant until Seaboard made the alteration. But when Seaboard made the alteration the order would be "functus officio" and the bridge would, therefore, never be an obstruction of navigation from the time the order was passed until the bridge was completed. This particular order was issued February 13, 1946, and the approval of the plans was given June 26, 1950. The argument of Seaboard and the decision of the Court of Appeals is that this bridge was not an unreasonable obstruction of navigation during the 4 years and 4 months which elapsed from its date until the approval of the plans. This decision is the fundamental error of the Court of Appeals.

The risks of the hazards of the unreasonable obstruction of navigation were from the date of the order of the Secretary of War until the hazard was removed the risks of the Seaboard and not the risks of the users of the navigable waterway.

"The bridge and draws should be so constructed as not to at any time interrupt navigation" (p.419).

*Louisville Bridge Co. v. United States,*
242 U.S. 409.

The following case was a suit in equity against the United States to recover the increased cost of a bridge which the Secretary of War had required to be altered. The Court said (p.479) "From this we conclude that the withdrawal by Congress of its assent to the maintenance of the bridge when properly made is for all purposes of this case equivalent to the positive enactment that from the time of such withdrawal the further maintenance of the bridge shall be unlawful *** If modifications are directed, assent is in legal effect withdrawn, unless the required change is made."

*Bridge Co. v. United States,* 105 U.S. 470.

Although the bridge when built was a lawful bridge, it did not remain a lawful structure where by reason of changed conditions and increased demands of commerce and navigation, it became an unreasonable obstruction, and the duty is continuing to meet the new altered conditions. *C.B. & Q.R. Co. v. Drainage Com.*, 200 U.S. 561, 590; *People v. Metropolitan West Side El. Ry. Co.*, 285 Ill. 111; 121 N.E. 748.

## IV

**THE APPLICATION OF APRIL 23, 1937, OF SEABOARD TO INCREASE THE WIDTH OF THE DRAW SPAN TO 200 FEET AND TO RELOCATE THE DRAW SPAN, ESTABLISHES THE FACT THAT THE BRIDGE WAS AN UNREASONABLE OBSTRUCTION OF NAVIGATION, AND ESTOPS THE SEABOARD.**

This application to the Secretary of War (R. 408, 212, 312) was induced by the many protests which had been made by the Maritime interests at Savannah since 1934, and by the proposal of the District Engineer to institute a hearing on the subject on April 11, 1937 (R.407). The Secretary of War approved the proposal of Seaboard, approved the plans, and ordered the work to proceed and to be begun and completed on certain dates (R.491). Seaboard argues that this was a mere permit and was not compulsory. The proposal and acceptance by the Secretary of War constituted an agreement. Seaboard never took any action under this order except to procrastinate.

This agreement obviated the necessity of the Secretary of War making any finding under the Act that the bridge was an unreasonable structure.

In fact, therefore, the bridge was and continued to be an unreasonable obstruction of navigation from April 23, 1937. The fact being established, the Court of Appeals should have decided the case on the theory that the bridge was an unlawful structure.

Proctors for Seaboard argued in their reply brief in the Court of Appeals that the Truman-Hobbs Act revoked this agreement of April 23, 1937, of Seaboard to correct the hazards of the bridge and the order of the Secretary of War thereon. The Truman-Hobbs Act did exactly the contrary. It expressly under the provisions of Sections 12 (a), (b) and (c) provided that any bridge ordered by the Secretary of War to be altered *before* July 1, 1939, which was not begun or completed before that date should be entitled to the benefits of the apportionment of the cost between the United States and the bridge owner.

## V

**THE PROCRASTINATION OF THE SEABOARD CANNOT HAVE THE EFFECT OF CONTINUING THE BRIDGE AS A LAWFUL STRUCTURE AFTER ITS ADMISSION THAT IT WAS AN UNREASONABLE OBSTRUCTION AND AFTER THE REPEATED ORDERS TO ALTER THE BRIDGE BECAUSE IT UNREASONABLY OBSTRUCTED NAVIGATION. THE REASON FOR ITS PROCRASTINATION WAS THE PENDENCY OF THE TRUMAN-HOBBS LEGISLATION.**

Seaboard agreed April 23, 1937, to alter the bridge (Pam. Am. Ex. 4, R.408; Groves, R.212; Rhodes, R.312). It did absolutely nothing under this agreement. When the hearing on the bridge came on August 8, 1939, Mr. Cocke, General Counsel of Seaboard, was present and called attention to the Truman-Hobbs Bill which was passed July 1, 1939, (R.424). This Bill was vetoed by the President. It was passed a second time and again vetoed by the President and then passed over his veto June 21, 1940, (R.402, 403). Simpson, Chief Engineer of Seaboard, admitted that this legislation was introduced in Congress in 1937 (R.18); and that when Seaboard applied for the extension of time in February 1938 to begin the reconstruction of the bridge, one of the reasons was the fact that this bridge legislation was pending (R.182, 183).

The delay was profitable to Seaboard. The cost of the reconstruction of the bridge was allocated: to United States $1,564,000, and to Seaboard $168,000 (Pan Am. Ex. 5, R.409).

Seaboard could not procrastinate for its own advantage and throw the hazard of the bridge on the users of the navigable waterway.

The Court of Appeals in its opinion (R. 634) said "The record shows that there have been long standing complaints about the condition of the bridge and that the correction of the conditions obstructing navigation on the river has been long overdue."

## VI

**THE ORDER OF THE UNITED STATES COURT OF JUNE 29, 1939, IN SEABOARD BANKRUPTCY PROCEEDING HAS NO EFFECT UPON THE ORDER OF THE SECRETARY OF WAR OF JUNE 21, 1937, PASSED ON THE APPLICATION OF SEABOARD OF APRIL 23, 1937 (R. 408, 491).**

The substance of this order is contained in a letter from the Receiver of Seaboard of March 27, 1940, (R.507). The order of Court was that in view of the depression in railway earnings and the costs of the work, the matter should be left open until the further order of the Court. There was never any further order of Court. The order related to the matter stated in the above heading. It was not communicated to the War Department until 9 months after the order was passed. Neither the Secretary of War nor any of the Maritime interests at Savannah were parties to the proceeding or notified. It is apparent from the last paragraph of the Receiver's letter that Seaboard was sparring for time, on account of the pendency of the Truman-Hobbs legislation.

Ordinarily, we would not think it necessary to point out that this Court order could not set aside the order

of the Secretary of War of June 21, 1937, but Proctors of Seaboard say in their reply brief in the Court of Appeals "Appellee does not explain on what basis it would be possible to hold Seaboard liable for the action of its Receiver in obeying the valid order of the Court denying him permission to proceed with the alteration." We are not concerned with the internal affairs of the Seaboard Bankruptcy. As we have hereinbefore pointed out, the orders of the Secretary of War cannot be controlled or affected by the Courts, where the bridge owner does not avail himself of the appeal to the Courts furnished by the Bridge Acts. Seaboard could not throw the hazards of the bridge on the public by this simple expedient.

The excuse that the Receivers did not have sufficient funds to do the work is not a valid excuse, so far as the effectiveness of the orders of the Secretary of War are concerned. *Union Bridge Co. v. United States,* 204 U.S. 364, 403; *Delaware R. Co. v. Weeks,* 293 F. 114, 122.

## VII

**THE CERTIFICATE OF THE DISTRICT ENGINEER OF JANUARY 18, 1951.**

No comment on this certificate (R.50) would seem to be necessary, but for the fact that Proctors for Seaboard in their reply brief in the Court of Appeals emphasize it. The certificate is merely a recital of the orders of the Secretary of War, all of which are recited elsewhere in the record. The certificate concludes with the statement "that Seaboard Air Line Railroad Company was not then on the 22nd day of April 1950 (the date of this accident) in default as to any lawful order of the Secretary of the Army for the

modification or replacement of the bridge." The legal conclusions of the Engineer are not binding on anyone, especially when they are incorrect. He made another certificate dated February 21, 1951 (R.47), which referred to the approval of June 21, 1937, by the Secretary of War of the voluntary application of Seaboard to alter the bridge, in which approval the Secretary approved the plans submitted by Seaboard and ordered the alterations of the bridge to begin within 8 months (subsequently extended to June 15, 1939) and to complete the work within 3 years (R.491). There was no conclusion in this certificate that Seaboard was not in default.

As we have previously herein argued, the fact that Seaboard was not in default on the order of February 13, 1946, does not suspend or affect the pronouncement on that date that the bridge was an unlawful structure. The said certificate of January 18, 1951, states that the Chief of Engineers of the Army ordered the Seaboard to submit the specifications for the alterations not later than March 27, 1950, subject to the approval of the Chief of Engineers, and that the bids were approved June 22, 1950. Did the bridge cease to be an obstruction to navigation during the 4 years and 4 months that Seaboard and the Chief of Engineers dawdled over the plans and specifications? We think not Neither the Chief of Engineers nor Seaboard could affect the validity and the vitality of the order of the Secretary of War that the bridge was an unreasonable obstruction of navigation on February 13, 1946. It did not become any the less an unreasonable obstruction of navigation by the lapse of time. The question whether Seaboard was or was not

in default as to the order of February 13, 1946, had no effect upon the order that the bridge was an unreasonable obstruction of navigation.

## VIII

**IT MAY BE SERIOUSLY DOUBTED WHETHER THE SECRETARY OF WAR HAD ANY AUTHORITY TO WITHDRAW HIS ORDER OF OCTOBER 17, 1939, OR TO GRANT ANY EXTENSION OF TIME FOR MAKING ALTERATIONS.**

"The Secretary of War is without authority to grant a Railway Company an extension of time for making alterations specified in an order."

*Opinions of Attorney Generals,* Vol. 38, p.431.

The Bridge Acts make it the *duty* of the Secretary to declare the bridge an unreasonable structure when he has reason to believe it is. When he does so after notice and hearing and there is no appeal from the order, it becomes a final judgment. It is a matter of discretion with the Secretary of War whether he will prosecute the bridge owner criminally, who does not comply with the order.

## IX

**THE STATEMENT BY THE COURT OF APPEALS AS TO THE LARGE NUMBER OF SHIPS WHICH PASSED THROUGH THE BRIDGE WITHOUT ANY MATERIAL DAMAGE.**

The Court of Appeals makes a statement with reference to this matter in two places in its opinion (R. 628, 634). We do not perceive the relevance of this in view of the orders of the Secretary of War

that the bridge on account of the narrow width of the draw span obstructed navigation. We call attention to the evidence of Commander Brill (R. 214. 295) in which he names four ships which came in contact with the bridge, and the statement of Groves (R.216) who names an additional ship which was in difficulty with the bridge. Brown (R.283) stated he had many close shaves, and Spencer (R.228) stated "The bridge is a hazard to large ships under the best of conditions."

The point is that while many ships passed through the bridge without contact with the bridge, yet occasionally ships did come in contact with the bridge, and the fact that they may merely scraped it, does not mean that the bridge was not a hazard. But we repeat, what has this to do with the case after the Secretary of War pronounces the bridge an unreasonable obstruction of navigation?

## X

**EVEN IF IT WERE CONCEDED THAT THE SHIP WAS NEGLIGENTLY NAVIGATED, THE COURT OF APPEALS SHOULD HAVE DECIDED THE UNLAWFUL BRIDGE WAS A CONTRIBUTING CAUSE OF THE DAMAGE AND THE CASE BEING ONE OF MUTUAL FAULT THE DAMAGES TO THE SHIP AND THE BRIDGE SHOULD BE DIVIDED.**

The rule in Admiralty of division of damages in case of mutual fault where two ships are involved, applies to a case of a collision of a ship with a bridge or other stationary object. *Atlee v. Packet Co.*, 21 Wall. 389; *U. S. v. Norfolk-Berkley Bridge Co.*, 29 F. (2d) 115, (h.n. 14 and 15); *Baker Brothers*, 260 F. 650.

## PART II

(This Part relates to the navigation of the ship. Most of the evidence is either quoted or cited in the Petition for Certiorari).

## XI

**THE DECISION OF THE COURT OF APPEALS IS CONTRARY TO THE OVERWHELMING EVIDENCE IN THE CASE AND COMPLETELY IGNORES THE FINDINGS OF FACT OF THE DISTRICT JUDGE WHO SAW AND HEARD THE WITNESSES.**

We maintain that the evidence quoted and cited in the Petition for Certiorari demonstrates that the Court of Appeals decided this case contrary to the evidence and totally disregarded the findings of fact of the District Judge which were supported by the great weight of the evidence.

The rule in all of the ten Judicial Circuits is that where the District Judge saw and heard the witnesses (as did the District Judge in this case), that the Court of Appeals *must* follow the findings of the District Judge, unless they are clearly erroneous.

4th Benedict's Admiralty, §537 (6th Ed.), cites cases from each of the ten Judicial Circuits (including the 5th) to this effect.

The following cases were decided by the 5th Circuit Court of Appeals, in which one or more of the Judges who decided this case, sat: *Colvin v. Kukusai,* 72 F. (2d) 44; *Escandon v. Pan American Foreign Corp.,* 88 F. (2d) 276; *Miller v. Lykes Bros. S.S. Co.,* 98 F. (2d) 185; *Lucayan Transports v. McCormick Shipping Corp.,* 188 F. (2d) 202, 205.

See also cases from other Circuits as follows:

*Peterson L. & T. Corp. v. N.Y. Central* (Judge L. Hand), 126 F. (2d) 993; *Matton Oil Transfer Corp. v. Dynamic,* 123 F. (2d) 999, 1000; *The Marguerite,* 140 F. (2d) (7th C.C.A.) 491; *Commercial Molasses Co. v. N.Y. Barge Corp.,* 114 F. (2d) 248, 250; *Griffith v. Gardner,* 196 F. (2d) (9th C.C.A.), 698, 701.

Judge Frank in the 2nd Circuit expressed the principle tersely, thus: "We do not sit as triers of the facts. In the light of Admiralty Rule 46½, it is for the trial Judge, not for us, after hearing the witnesses to pass on the weight of the evidence, consider questions of credibility and make findings. In this case, as the findings are not clearly erroneous, we cannot disturb them."

*Kulukundis Shipping Co. v. Amtorg Trading Corp.,* 126 F. (2d) 978, 980.

"An impeccably 'right' legal rule applied to the 'wrong facts' yields a decision which is as faulty as one which results from the 'wrong' legal rule to the 'right facts' ".

*United States v. Forness,* 125 F. (2d) 928, 942.

This is the rule when an Admiralty case is appealed to the Supreme Court.

*Davis v. Schwartz,* 155 U.S. 631, 636.

And is the general rule in all judicial proceedings.

*Adamson v. Gilliland,* 242 U.S. 350, 353.

## XII

**THE APPROACH TO THE BRIDGE WAS THE PROPER AND USUAL APPROACH.**

(a) The river runs at this point upstream East to West and the bridge crosses the river from the Savannah side South to North. The draw span is on the extreme South end of the bridge and the South abutment on which the span rests is near the South shore. It is variously expressed by the witnesses that a vessel approaching the draw span of the bridge would have to come in at an angle, that the draw span was not in direct line with the channel (R. 212, 215, 262, 269, 439); Chief Engineer of Seaboard (R.488).

The ship was an oil tanker fully loaded 440 ft. long, 66.8 ft. beam, and drawing 28.3 feet. The Court of Appeals decided that the ship approached the draw span on the wrong course, and adopted the evidence of the witness, Ahern, who had been an Admiral in the Coast Guard, and who observed the approach of 8 different vessels to this bridge. He at one time operated a Coast Guard Cutter at Savannah *but had never been through this bridge.* He was retained by Seaboard for a fee to watch ships at the bridge as they approached it and to testify for Seaboard in this case (R.121,122).

**(b) Ahern's Chart.**

This is Seaboard's Exhibit 1 "In Specie". It does not show the location of the channel nor the depths in the river. Ahern simply started at a point 3/8 of a mile down river and drew a straight line from that point through the draw span of the bridge, disregard-

ing wholly the fact that the draw span is at an angle to the channel. Seaboard's Exhibit 3 "In Specie" shows the channel and the depths of the river and the second page of this Exhibit shows the scale is 500 feet to the inch. Pan American Ex. 40 "In Specie" is the same map as Seaboard's Exhibit 3, and shows the proper course with a red line slightly to the North of the middle of the channel which, on the chart, is indicated by the word "Range". Capt. Moura of the "Pan Maryland" testified (R.274) that if his ship had started in a straight line for the drawbridge 3/8 of a mile from the bridge, the stern of his ship "would have been something like 2300 feet from the bridge and I think the way that span aligns itself with the channel of the river that the stern of the vessel would be aground, I am not sure, but I think so." Looking at Exhibit 40 "In Specie" 3/8 of a mile from the bridge, plus the length of the ship, would have been 2420 feet from the bridge opposite target 109 and a straight line from that point to the bridge would put the ship a little to the South of the channel and into shoal water. The channel is 400 feet wide and as this bridge is at an angle to the channel, obviously from the chart the proper and safe way to approach the bridge would be on a course a little to the North of the middle of the channel.

**(c) The usual course is as shown on the chart, Ex. 40 by a red line.**

Six witnesses testified that this was the usual and proper course. Groves, who as President of Savannah Port Authority, was familiar with the river and the bridge, and a wholly disinterested witness; Spencer, a disinterested witness, who had been a Savannah River pilot with 40 years' experience and who

had been through the bridge many times; Brown, a Savannah River pilot who had no connection, whatever, with this accident; Clark, the pilot of the ship; Capt. Moura, who was on the ship standing beside the pilot, and who had been through the bridge on 30 round trips; and Casey, the first mate who was standing on the foc'slehead (R.360), and who had made several round trips through this bridge. Here were 6 witnesses, all of whom flatly contradicted Ahern, 3 of them absolutely disinterested and familiar with the river and conditions at the bridge, and yet the Court of Appeals adopted the evidence of Ahern, when under the universal rule it should have adopted the testimony of the Pan American witnesses. The District Judge upheld the 6 witnesses above mentioned in his findings of fact, Nos. 19-25 (R.70-73) and his conclusions of law thereon, Nos. 1,2,3, (R.73-74). The Court of Appeals could not lawfully under the evidence in this case, hold that the findings of fact of the District Judge "were clearly erroneous." The witness Ahern made his observations from the bridge, but the evidence does not show where he was standing on the bridge. It is quite possible that his observations of the movements of the ships which began 3/8 of a mile away were mistaken. At any rate he was an observer, whose "wish was father to the thought."

## XIII

### THE MANEUVERS OF THE SHIP UP TO THE TIME SHE TOOK THE SHEER.

The evidence on this subject is marshalled in the Petition for Certiorari at pages 17, 18. The undisputed evidence on this subject is briefly as follows: The ship was proceeding slightly North of the center of the

channel (which was the usual course). In order to get over to the draw span which was on the South side of the river at an angle to the channel at about a distance of 1,000 feet at Target 108 on the Chart (Pan Am. Ex. 40 "In Specie"), the pilot gave the ship a left wheel, and as the ship showed a disposition to go to the right, the pilot gave her a hard wheel to left to bring her in line with the bridge and at this point the ship took the sudden sheer hereinafter referred to. The maneuvers of the ship from the right side of the center of the channel to get in line with the bridge span, Proctor for Seaboard describes as "complicated maneuvers." The complication was in the situation of the draw span with reference to the channel and not in the manner in which the ship approached the draw. There was no evidence to refute our contention that the ship was properly maneuvered up to the time of the sudden sheer.

## XIV

**AT THE TIME THE SHEER TOOK PLACE WHICH WAS THE ACTIVATING CAUSE OF THE COLLISION, THE SHIP HAD ABOUT STRAIGHTENED UP TO GO THOUGH THE DRAW.**

The sheer took place when the ship was about 200 feet from the draw span. The pilot testified, that when within about 200 feet of the bridge he "was pretty well lined up to go through the bridge" (R. 247). Capt. Moura testified (R.269) "At the time we were coming left to line up for the span and just about to steady the vessel to make the passage through the span when the ship sheered, and when a ship sheers, a ship sheers." Casey, the Chief Mate, testified that when the ship was about 200 feet from the bridge she sheered

sharply to the left. As a matter of fact, the manner in which the ship approached the bridge had nothing whatever to do with the collision. The Court of Appeals made much of it and decided the question absolutely contrary to the evidence.

## XV

### THE SUDDEN AND UNEXPECTED SHEER OF THE SHIP, WHICH WAS THE ACTIVATING CAUSE OF THE COLLISION.

The evidence on this subject is marshalled on pages 18, 19, 20 of the Petition for Certiorari, and need 18, 19, 20 of the Petition for Certiorari, and need not be elaborated here. There is absolutely no evidence to contradict the undisputed evidence of the people on the ship that when within 200 feet of the bridge she suddenly and unexpectedly sheered to the left. The captain testified (R.270) that he meant by that term "sheers", a turn that is unanticipated and unavoidable." He compared it to the skidding of an automobile, the difference being that when an automobile skids, about 4,000 pounds is involved, but when a ship sheers, 15 to 20 thousand tons dead weight is involved. The fact of the sheer is indisputable. The Circuit Court of Appeals minimized it as much as possible, by saying the pilot should have known of the conditions at the approaches to the bridge. Of course, he knew that the water was shoal at the approach to the bridge—this was a condition he had to meet or not go through the bridge. It was not his fault that the ship sheered. It was not the usual or customary thing for the ship to sheer. But it is well known that ships will occasionally sheer when they are smelling the bottom as this ship was doing on this occasion.

The sheer brought about an emergency (all the witnesses testify to this) which the navigation of the ship neither caused nor contributed to. There is not any evidence from which the contrary could be inferred.

## XVI

### THE SHOAL OF THE CHANNEL IN THE APPROACH TO THE BRIDGE.

The Court of Appeals states in its opinion (R.632) that Seaboard was not responsible for the shoal at this point.

The facts as to this matter are marshalled at pages 11, 12, 20 of the Petition for Certiorari. (See also District Judge's findings of fact Nos. 17 and 18 (R. 69,70) and Conclusions of Law thereon, Nos. 3 and 5 (R.74,75) ). The channel at this point had not been dredged for a long time. June 18, 1946, the Chief Engineer of Seaboard wrote the District Engineer suggesting that it would be very unwise to dredge the channel at the approach to the bridge on account of the elevation of the pier footings (R.46). The last dredging in this locality was in 1949, 1,000 feet downstream (R.236).

The fathometer soundings at this point made April 4, 1950, two weeks before this collision (Pan Am. Ex. 41 "In Specie") show a depth of the channel within 200 feet of the bridge, 26 feet. A crossmark on this Exhibit shows the location of the bridge (R. 235). The first page of Pan Am. Ex. No. 3 (a) "In Specie," which is the District Engineer's Chart of the channel depths from the sea to the Seaboard Bridge, shows "S.A.L. Bridge to 1500 yds. S.E. 26 and 27 feet" and a foot note says "In the immediate vicinity of and through the S.A.L. Bridge the controlling

depth is 27 feet. The remainder of the channel is 31 feet." The sheer took place 200 feet from the bridge and the fathometer soundings show 26 feet. Harris, the employee of the District Engineer's office, who made the soundings testified (R.236) 1,000 feet from the bridge the depth at the right of the channel is 30 or 31 feet. It becomes shallower as the bridge is approached and as you go through the bridge it is 26 feet—"that is a shelf like in the bridge area." The ship was drawing 28.3 feet. The tide was neap about a 5 foot rise (R.285). This heavy laden ship was undoubtedly smelling the bottom when she sheered. Capt. Moura checking the channel after the accident, "found a fair shoal of water in the approaches to the draw."

Whoever was responsible for the shallow water at the bridge, the ship was not responsible for this condition; if anyone was responsible it was the Seaboard.

The Court of Appeals in its statement of the facts in the footnote to its decision (R.630) states "It was established at the time of the collision, the depth of water below the bridge was 32 feet. The draft of the ship was 28.3." This was only a half truth. Below the bridge the channel depth was 31 feet, but in the approaches to the bridge where the sheer took place the depth was 26 feet.

## XVII

### THE ORDER OF THE PILOT TO GIVE THE SHIP A HARD RIGHT RUDDER AND A FULL SPEED AHEAD SIGNAL WHEN SHE BEGAN TO SHEER.

The Court of Appeals severely condemns the pilot for giving these orders and holds the pilot responsible for the collision. When these orders were given the

ship had a hard left rudder to bring her in line with the Bridge. At this moment she took the sudden sheer to the left. The facts as to these orders are marshalled at pages 18, 19, 20 of the Petition for Certiorari. The testimony of the pilot, and he is supported by the Captain of the ship and by Brown, a Savannah Bar Pilot, is that the ship was in an emergency when she sheered and that as the sheer headed the ship to the left, he gave her a right hand rudder and a full speed ahead. The reason the full speed ahead was given was that the full speed would give a great pressure on the rudder and with a hard right wheel it would give the ship a chance to swing clear of the left side of the bridge span towards which she was headed.

We have no apologies to make for the orders which were given in this emergency. This is the evidence of experienced seamen. The Court of Appeals does not accept the evidence of these experienced seamen although there is no evidence to contradict it. The evidence is sound and reasonable. The Court of Appeals relies on its own notions of seamanship rather than on the indisputable evidence of practical men who speak from their actual experience.

Ahern who was not on the spot and, of course, knew nothing about the actual occurrence and testified before the Pan American witnesses and was not recalled in rebuttal, testified (R.136): "The rudder seemed to be working. She had too little speed steerageway and she could not come back in that distance. It takes quite a little to come back on the course, and she did not have that steerageway, *and she got the full speed bell too late because she was still swinging to the left.*" The witness on whom the Court of

Appeals relied completely went back on the Court's theory of good seamanship.

The ship necessarily approached the bridge at slow speed. It was a hazardous passage for this large ship. If she had approached at greater speed it would have been claimed that her speed was too great. Casey, the Chief Mate, testified she approached the bridge at slow speed (R.362), so did the Pilot (R.225). Spencer testified the maximum speed allowed by law was 4 miles per hour.

Everything was favorable for a safe passage of the ship and but for the sudden sheer there would have been no collision.

Before the bridge was struck, the pilot gave the signal for full speed astern to check the force of the blow (R.271). The photograph No. 6 of Pan Am. Ex. 42 "In Specie" shows the close quarters of the ship with the bridge when the sheer occurred.

## XVIII

**THE SHIP BEING IN A SUDDEN EMERGENCY ON ACCOUNT OF THE SHEER, EVEN IF THE SUDDEN CHOICE OF MANEUVERS WHICH THE PILOT TOOK WAS ERRONEOUS, IT WOULD NOT BE CULPABLE NEGLIGENCE AND THE LAW EXCUSES THE NAVIGATOR UNDER SUCH CIRCUMSTANCES.**

There is abundance of authority to this effect. The Court of Appeals gets around this well established principle of law by holding (R.635) "We are convinced that if there was a sheer it was of the pilot's

own making, brought about by the negligent way and manner in which he approached the draw, and the negligent maneuvering while trying to pass through, and that its consequences, instead of being met and averted by careful navigation afterward were made more potent for harm by the plain and inexcusable negligence of the final full speed ahead order, which flinging the ship down upon the bridge drove her with great force and resultant damage against it." This is going pretty strong to say the sheer was of the pilot's own making. The evidence which the Court of Appeals did not follow shows that there was no antecedent negligence in the manner of the approach to the bridge and that there was no subsequent negligence when the sheer occurred, and that the order for hard right rudder and full speed ahead were proper and seamanlike under the circumstances and cannot lawfully be charged as culpable negligence.

## CONCLUSION

We respectfully submit that the Court of Appeals in deciding this case contrary to the evidence and in failing to accept the findings of fact of the District Judge, which were not clearly erroneous, has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision.

We also respectfully submit that the decision of the Court of Appeals that the bridge was not an unlawful structure was a fundamental error of law, and if it was the the judgment should have been for Petitioner and against Respondent; and even if the

ship had been negligently navigated the judgment should in that event have been for a division of damages.

Respectfully submitted,

Julian C. Sipple,
26 Bryan Street, East,
Savannah, Georgia.

T. M. Cunningham,
26 Bryan Street, East,
Savannah, Georgia.

A. R. Lawton,
26 Bryan Street, East,
Savannah, Georgia.

Herbert P. Reid,
76 Beaver Street,
New York, N. Y.

*Proctors for Petitioner.*

Dated: January 17, 1953.

# APPENDIX

The Seaboard Bridge was built under the Special Act of Congress of February 2, 1899 (30 Stat. 813), the material portions of which are as follows:

"An Act To authorize the construction of a bridge across the Savannah River from the mainland of Chatham County, Georgia, to Hutchinsons Island, in said county.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the assent of the United States of America is hereby given to the Georgia and Alabama Railway, a corporation incorporated by the laws of the State of Georgia, its successors and assigns, and such other persons as may be associated with it, to construct and maintain a bridge over the Savannah River from the mainland to Hutchinsons Island, in the county of Chatham, in the State of Georgia.

"Sec. 2. That the bridge shall be so constructed, by draw span or otherwise, that a free and unobstructed passage may be secured to all vessels and other water craft navigating said river. That any bridge constructed under this Act shall be built and located under and subject to such regulations for the security of the navigation of said river as the Secretary of War shall prescribe; and to secure that object the said company shall submit to the Secretary of War, for his examination and approval, the design and drawings of the bridge, piers, and approaches, and a map of the location, giving, for the space of at least one mile above and one mile below the proposed location, the topography of the banks of the river, the shore lines at high water and low water, and the direction and strength of the currents at all stages, and the soundings, accurately showing the

bed of the stream, and the location of other bridge or bridges, wharves, landings, or ferries, and shall furnish such other information as shall be required for a full and satisfactory understanding of the subject; and until said plan and location of the bridge are approved by the Secretary of War the bridge shall not be commenced or built, and after such approval by the Secretary of War the approved plans and designs for the bridge shall not be deviated from or added to, either during the construction or after the completion of the bridge, until the proposed change shall have been submitted to the Secretary of War and received his approval; and the said bridge shall be at all times so kept and managed as to offer reasonable and proper means for the passage of vessels through or under said bridge, and if said bridge be built with a draw said draw shall be opened promptly upon reasonable signal for the passage of boats or other craft, and whatever kind of bridge is built the said company or corporation shall maintain, at its own expense, from sunset to sunrise, such lights or other signals thereon as the Light-House Board shall prescribe; and if at any time the navigation of said river shall in any manner be obstructed or impaired by the bridge authorized by this Act to be constructed the Secretary of War shall have authority, and it shall be his duty, to require said company to alter and change said bridge at its own expense in such manner as may be proper to secure free and complete navigation without impediment.

"Sec. 3. That any bridge built under this Act and subject to its limitations shall be a lawful structure, ***

* * *

"Sec. 6. That the right to alter, amend, or repeal this Act is hereby expressly reserved.

"Approved, February 2, 1899."

**ACT OF MARCH 3, 1899, SECTION 18. (30 STAT. 1121, 1153; 28 U.S.C.A. §§494, 495).**

"Sec. 18. That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month such persons,

corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed: PROVIDED, That in any case arising under the provisions of this section an appeal or writ of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court either by the United States or by the defendants."

TRUMAN-HOBBS ACT.

**ACT OF JUNE 21, 1940, (54 STAT. 497; 33 U.S.C.A. §§511-523).**

"AN ACT To provide for the alteration of certain bridges over navigable waters of the United States, for the apportionment of the cost of such alterations between the United States and the owners of such bridges, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

**Definitions**

Section 1. When used in this Act, unless the context indicates otherwise—

The term 'bridge' means a lawful bridge over navigable waters of the United States, *** used and operated for the purpose of carrying railroad traffic ***

**Obstruction of Navigation**

Sec. 2. No bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States.

**Notice, Hearings and Findings**

Sec. 3. Whenever any bridge shall, in the opinion of the Secretary, at any time unreasonably obstruct such navigation, it shall be the duty of the Secretary, after notice to interested parties, to hold a hearing at which the bridge owner, those interested in water navigation thereunder or therethrough, those interested in either railroad or highway traffic thereover, and any other party or parties in interest shall have full opportunity to offer evidence and be heard as to whether any alteration of such bridge is needed, and if so what alterations are needed, having due regard to the necessity of free and unobstructed water navigation and to the necessities of the rail or highway traffic. If, upon such hearing, the Secretary determines that any alterations of such bridge are necessary in order to render navigation through or under it reasonably free, easy, and unobstructed, having due regard also for the necessities of rail or highway traffic thereover, he shall so find and shall issue and cause to be served upon interested parties an order requiring such alterations of such bridge as he finds to be reasonably necessary for the purpose of navigation.

**Submission and Approval of General Plans and Specifications**

Sec. 4. It shall be the duty of the bridge owner to prepare and submit to the Secretary, within ninety days after service of his order, general plans and specifications to provide for the alteration of such bridge in accordance with such order, and for such additional alteration of such bridge as the bridge owner may desire to meet the necessities of railroad or highway traffic, or both. The Secretary may approve or reject such general plans and specifications, in whole or in part, and may require the submission of new or additional plans and specifications, but when the

Secretary shall have approved general plans and specifications, they shall be final and binding upon all parties unless changes therein be afterward approved by the Secretary and the bridge owner.

**Contracts for Project; Guaranty of Cost**

Sec. 5. After approval of such general plans and specifications by the Secretary, and within ninety days after notification of such approval, the bridge owner shall, in such manner as the Secretary may prescribe, take bids for the alteration of such bridge in accordance with such general plans and specifications. All bids, including any bid for all or part of the project submitted by the bridge owner, shall be submitted to the Secretary, together with a recommendation by the bridge owner as to the most competent bid or bids, and at the same time the bridge owner shall submit to the Secretary a written guaranty that the total cost of the project, including the cost of such work as is to be performed by the bridge owner and not included in the work to be performed by contract, shall not exceed the sum stated in said guaranty. The Secretary may direct the bridge owner to reject all bids and to take new bids, or may authorize the bridge owner to proceed with the project, by contract, or partly by contract and partly by the bridge owner, or wholly by the bridge owner. Upon such authorization and fixing of the proportionate shares of the cost as provided in section 6, the bridge owner shall, within a reasonable time to be prescribed by the Secretary, proceed with the work of alteration; and the cost thereof shall be borne by the United States and by the bridge owner, as hereinafter provided.

(Sections 6, 7 and 8 relate to apportionment of the cost between the Government and the Bridge owner and appropriations therefor).

**Failure to Comply with Orders; Penalties; Removal of Bridge**

Sec. 9. Any bridge owner who shall willfully fail or refuse to comply with any lawful order of the Secretary, made in accordance with the provisions of this Act, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished in any court of competent jurisdiction by a fine not exceeding $5,000, and every month such bridge owner shall remain in default shall be deemed a new offense and subject such bridge owner to additional penalties therefor. In addition to the penalties above prescribed the Secretary may, upon the failure or refusal of any bridge owner to comply with any lawful order issued by the Secretary in regard thereto, cause the removal of any such bridge and accessory works at the expense of the bridge owner; and suit for such expense may be brought in the name of the United States against such bridge owner and recovery had for such expense in any court of competent jurisdiction. The removal of any bridge erected or maintained in violation of the provisions of this Act or the order or direction of the Secretary made in pursuance thereof, and compliance with any order of the Secretary made with respect to any bridge in accordance with the provisions of this Act, may be enforced by injunction, mandamus, or other summary process upon application to the district court of any district in which such bridge may, in whole or in part, exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States at the request of the Secretary.

**Review of Findings and Orders**

Sec. 10. Any order made or issued under section 6 of this Act may be reviewed by the circuit court of appeals for any judicial circuit in

which the bridge in question is wholly or partly located, if a petition for such review is filed within three months after the date such order is issued. The judgment of any such court shall be final except that it shall be subject to review by the Supreme Court of the United States upon certification or certiorari, in the manner provided in sections 239 and 240 of the Judicial Code, as amended. The review by such Court shall be limited to questions of law, and the findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive. Upon such review, such court shall have power to affirm or, if the order is not in accordance with law, to modify or to reverse the order, with or without remanding the case for a rehearing as justice may require. Proceedings under this section shall not operate as a stay of any order of the Secretary issued under provisions of this Act other than section 6, or relieve any bridge owner of any liability or penalty under such provisions.

(Sec. 11 relates to rules and regulations).

**Existing Provisions of Law.**

Sec. 12. (a) The first sentence of section 4 of the Act entitled 'An Act to regulate the construction of bridges over navigable waters', approved March 23, 1906 (U.S.C., 1934 edition, title 33, sec. 494), and section 18 of the Act entitled 'An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes', approved March 3, 1899 (U.S.C., 1934 edition, title 33, sec. 502), shall be inapplicable with respect to any bridge to which the provisions of this Act are applicable, except to the extent provided in this section.

(b) Any bridge, the construction, reconstruction, or alteration of which was required by

an order of the Secretary issued prior to July 1, 1939, and was not completed on such date, and in the case of which no penalties have accrued at the time of the enactment of this Act, shall be constructed, reconstructed, or altered as required by such order, and not in accordance with the provisions of this Act. In the case of any such bridge, however, the Secretary shall apportion the cost of the project between the bridge owner and the United States, and payment of the share of the United States shall be made, in the same manner as if the provisions of this Act applied to such construction, reconstruction, or alteration, subject to the following limitations:

* * *

(c) Any bridge (except a bridge to which subsection (b) applies) the construction, reconstruction, or alteration of which was required by an order of the Secretary issued prior to July 1, 1939, and was not begun before such date, shall be subject to the provisions of this Act as though such order had not been issued, and compliance with the provisions of this Act and with such orders as may be issued thereunder shall be considered to constitute compliance with such order issued prior to July 1, 1939, and with the provisions of law under which it was issued."

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IN THE

# Supreme Court of the United States.

**OCTOBER TERM, 1952.**

**No. 557.**

PAN AMERICAN PETROLEUM & TRANSPORT COMPANY,
*Petitioner,*

—against—

SEABOARD AIR LINE RAILROAD COMPANY,
*Respondent.*

**BRIEF FOR RESPONDENT SEABOARD AIR LINE RAILROAD COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.**

E. ORMONDE HUNTER,
*Counsel for Respondent,*
*Seaboard Air Line Railroad Company,*
P. O. Box 525,
Savannah, Georgia.

GEORGE W. WILLIAMS,
*Of Counsel,*
P. O. Box 566,
Savannah, Georgia.

THE COURT PRESS, 130 Cedar Street, N. Y. C.

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## Opinions Below.

The opinion of the Court of Appeals for the Fifth Circuit (R. 625-635) is reported at 199 F. (2d) 761. The findings of fact and conclusions of law of the District Court for the Southern District of Georgia (R. 61-82) are reported at 105 F. Supp. 958.

## Jurisdiction.

The judgment of the Court of Appeals for the Fifth Circuit was entered on November 15, 1952 (R. 635). A petition for rehearing was denied on December 16, 1952 (R. 652). The petition for a Writ

of Certiorari was filed on January 19, 1953. The petitioner invokes the jurisdiction of this Court under U. S. Code, Title 28, Section 347(a), (now Title 28, Section 1254(1)).

## The Questions Presented.

The questions sought to be presented by the petitioner are purely questions of fact. The case as unanimously decided by the Court of Appeals for the Fifth Circuit presents no relevant or substantial question of law.

## The Reasons for Denying the Writ.

The Court of Appeals after a thorough review of the evidence stated the facts as follows:

> "About 12 o'clock noon on a bright clear day, without the interference of wind, wave, or vessel, the Tanker Pan Maryland, while endeavoring to pass through the Seaboard drawbridge over the Savannah River, struck the bridge at such speed and with such force as to cause serious damage to it and to the tanker itself" (C. A. Opinion R. 625, 199 F. (2d) 761).

These facts are not disputed.

The Court of Appeals also said that the evidence "shows with crystal clearness" that the maneuvering of the ship was negligent (R. 632, 199 F. (2d) 764).

The Court of Appeals continued saying:

> "Under these circumstances, where the active and effective cause of the collision was the culp-

ably negligent navigation of the vessel, if the bridge had been, as it was not, an unlawful structure, if libellant had been, as it was not, responsible for the shoaling complained of, and the shoaling, as it was not, had been a contributing cause of the injury, the most that appellee could possibly contend for would have been divided damages" (R. 632, 199 F. (2d) 764).

Continuing the Court held that even if it were assumed as above, that the bridge was an "unlawful structure", there would be no basis on the facts in this case for a division of damages. The Court said:

> "When, as the record shows to be the case here, the conditions claimed to be unlawful or negligent are entirely passive and have existed for many years to the knowledge of the moving vessel; when, too, *the evidence is, as here, uncontradicted that,* while these conditions do tend to make the passage more difficult than if they did not exist, *a passage can be safely made under the conditions if due care is exercised;* there is no basis in the record even for a division of the damages in favor of the actively negligent moving vessel, much less for awarding it full damage" (R. 632-633, 199 F. (2d) 765). (Emphasis ours.)

The Court pointed out that 1771 vessels, 670 of which were owned or operated by Pan American, had passed back and forth through this draw with only one ship receiving any material damage; that the pilot of the Tanker "Pan Maryland" had taken hundreds of vessels through the same draw; that it was a reasonably safe passage if conditions were favorable, and that

> "It was established by all of the evidence that at the time of the collision the most favorable con-

ditions existed for the passage, slack high waters, no appreciable wind, daylight, and a perfect visibility" (R. 634, 199 F. (2d) 765).

As to the legal status of the bridge, the Court said:

"The undisputed facts as to these matters, however, do not support the finding in law that at the time of the collision the bridge was an unlawful structure, or that its existence was in and of itself negligent so as to authorize recovery in favor of those who bungled and blundered their way into collision with it" (R. 633-634, 199 F. (2d) 765).

Under this decision any question of technical legality of the bridge is, we submit, irrelevant.

The petitioner, nevertheless, argues that the bridge owner cannot escape sharing liability for the damage resulting from this accident because of certain orders made by the Secretary of the Army for modification of the bridge. Prior orders having been rescinded, the order in effect at the time of the collision was the order of February 23, 1946. That order was issued under the Truman-Hobbs Act of June 21, 1940 (54 Stat. 497; 33 U. S. Code 511-523) which prescribes the procedure to be followed by the bridge owner before undertaking any modification of the bridge. It is undisputed, and it was found by the District Court, that at the time of the collision, the bridge was being maintained in accordance with and conformed to lawful orders of the Secretary of the Army (Finding 9, R. 50). By order of the Chief of Engineers of the Army under procedures set up under the Truman-Hobbs Act, specifications calling for bids for the modification of the bridge to accomplish the alteration called for by the order of the Secretary of the Army of February 23,

1946 had been submitted by Seaboard prior to March 27, 1950 (Finding 8, R. 50). A successful bid was not designated and approved by the Chief of Engineers until June 22, 1950, two months after the collision (Finding 8, R. 50). At the time of the collision Seaboard was not in default as to any lawful order of the Secretary of the Army for modification or replacement of the bridge (Finding 9, R. 50-51).

If Seaboard had proceeded with any modification of the bridge prior to approval of a bid and authorization by the Chief of Engineers, it would have violated the following provisions of the Statute under which the bridge was constructed:

> "After such approval by the Secretary of War the approved plans and designs for the bridge shall not be deviated from or added to, either during the construction or after the completion of the bridge, until the proposed change shall have been submitted to the Secretary of War and received his approval" (30 U. S. Statutes at Large, 813).

It would also have violated the provisions of the general Act passed in the same year, 1899, stating:

> "That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War" (33 U. S. Code § 401).

Petitioner's argument is nevertheless that since the Secretary's order of February 23, 1946 was neces-

sarily based on a finding that the bridge was "an unreasonable obstruction", it results that from that date the bridge was an "unlawful structure" (Petitioner's Brief, p. 5) and that from that date all risks were risks of Seaboard (Petitioner's Brief, p. 6). Petitioner's interpretation of the statutes and orders would visit on the innocent bridge owner, who had built his bridge in full compliance with every legal requirement, full liability for damage to any passing vessel, however negligently operated, during the period between the issuance of an order for modification and the completion thereof, in spite of the fact that the bridge owner could not physically or legally complete the modification sooner. Such torturing of the statutes would produce a most unjust result and is, we submit, legally untenable. The Court of Appeals quite properly rejected this argument.

No reason is shown for the issuance of the Writ. The questions presented are almost entirely questions of fact determined by the Court of Appeals adversely to the petitioner after a full review of all the evidence. This is completely substantiated by petitioner's statement in its supporting brief (Petitioner's Brief, p. 1) that "in order to show the extent to which the Court of Appeals has gone in this respect it is necessary to state with particularity the evidence in the case". This directly contradicts any contention that any point of law is controlling in this case.

Jurisdiction to bring up cases by certiorari "was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing". *Magnum Co.* v. *Coty*, 262 U. S. 159, 163. No question of conflict between the circuits, nor any question of transcending public importance is present. As to this bridge any question is academic, be-

cause the alterations prescribed by the order approving the bid of June 22, 1950, have been completed.

The Court of Appeals rightfully reviewed the evidence and unanimously reached conclusions at variance with the findings and conclusions of the District Court. It did so because the conclusions of the District Court were clearly erroneous. The Court of Appeals has "a clear responsibility * * * as to questions of fact". *The Anaconda* (C. C. A. 4), 164 F. (2d) 224, 225; *The Ariadne*, 13 Wall. (80 U. S.) 475, 479. The decision of the Court of Appeals on the evidence was wholly justified and is clearly correct.

The petitioner seeks only a review of questions of fact as decided unanimously by the experienced judges of the Court of Appeals and to escape from, or ameliorate, the results of its own gross negligence as found by the Court of Appeals.

The Court of Appeals did not "so far depart[ed] from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision" (Petition, p. 22). There was no "departure from the accepted and usual course of judicial proceedings" by the Court of Appeals.

**The petition should be denied.**

Respectfully submitted,

E. Ormonde Hunter,
*Counsel for Respondent,*
*Seaboard Air Line Railroad Company.*

George W. Williams,
*Of Counsel.*

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1952

No. 557

PAN AMERICAN PETROLEUM TRANSPORT CO., Petitioner,

vs.

SEABOARD AIR LINE RAILROAD COMPANY, Respondent.

PETITION FOR WRIT OF CERTIORARI

# BRIEF OF PETITIONER IN REPLY TO BRIEF OF RESPONDENT.

JULIAN C. SIPPLE
26 Bryan Street, East,
Savannah, Georgia.

A. R. LAWTON,
26 Bryan Street, East,
Savannah, Georgia.

T. M. CUNNINGHAM,
26 Bryan Street, East,
Savannah, Georgia.

HERBERT P. REID,
76 Beaver Street,
New York, N. Y.

*Proctors for Petitioner.*

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# BRIEF OF PETITIONER IN REPLY TO BRIEF OF RESPONDENT.

## I

## THE SEABOARD BRIDGE WAS AN UNREASONABLE OBSTRUCTION TO NAVIGATION.

The burden of Respondent's brief is that there is nothing before the Court but questions of fact.

The principal question in the case is not a question of fact at all. It is a pure question of law and involves interpretation and application of Acts of Congress relating to bridges over navigable waters.

Respondent's brief states, p.4:

> "Prior orders having been rescinded, the order in effect at the time of the collision was the order of February 23, 1946."

This entirely ignores the application of the Seaboard made to the Secretary of War April 23, 1937, to reconstruct the bridge so as to provide a draw span of 200 feet and to relocate the draw span, this application being in response to frequent protests of the maritime interests. June 27, 1937, the Acting Secretary of War approved the plans of the Seaboard and authorized the work to proceed. Seaboard so procrastinated that the time expired for the work to be done (under this approval of the Secretary of War) June 21, 1940, the very day the Truman-Hobbs Act was passed. The orders in reference to this application of April 23, 1937, were never repealed. (See our brief, bottom p.5, top p.6).

The order of the Secretary of War of February 23, 1946, denounced the bridge as an unreasonable obstruction of navigation. It then and there became an unlawful obstruction. The fact that the Chief Engineers and Seaboard between them dawdled for more than 4 years and 4 months, before the plans were approved by the Chief of Engineers does not relieve Seaboard. The Chief of Engineers had no power to affect this order of the Secretary of War.

The Seaboard is estopped to deny that the bridge was an unlawful obstruction of navigation.

These are all pure questions of law and they are important questions of law and affect the rights of the public in the navigable waters of the United States.

The question of the unlawful structure has an important bearing on the burden of proof. If the bridge was an unlawful structure there was a presumption of negligence against Seaboard and Seaboard would

have to prove affirmatively that the condition of the bridge *could not have* contributed to the collision (see our main brief Point 1, Page 2).

## II

**THE FINDINGS OF THE COURT OF APPEALS ON THE SUBJECT OF THE ALLEGED NEGLIGENCE OF THE "PAN MARYLAND" ARE ABSOLUTELY CONTRARY TO THE EVIDENCE.**

This is not exclusively a question of fact. It is a question both of law and of fact. Respondent's brief contents itself simply with stating that the Court's decision was right because the Court unanimously decided the case as it did on this question of fact. We have pointed out in our main brief that the Court completely ignored the Findings of Fact of the District Judge, and that the Findings of Fact of the District Judge were not only *not clearly erroneous*, but they were sustained by the great weight of the evidence. We further pointed out that the Court of Appeals substituted its idea of seamanship in the sudden emergency which confronted the ship for the sworn testimony of experienced seamen as to the proper maneuver under the sudden circumstances.

## III

**MISQUOTATION OF THE FINDINGS OF THE DISTRICT COURT.**

On page 4 of Respondent's brief it is stated:

> "It is undisputed, and it was found by the District Court that at the time of the collision the bridge was being maintained in accordance with and conformed to the lawful orders of the Secretary of the Army. (Findings 9, R.50)."

There is no such finding of the District Court. The reference to the record (Finding 9, R.50) is to a certificate made by Col. Erlenkotter, United States District Engineer at Savannah. We have commented on this certificate of the Colonel in our main brief (Point VII, pp. 11 and 12).

## IV

**A DECISION OF THE COURT OF APPEALS SHOULD NOT BE IMMUNE TO A WRIT OF CERTIORARI WHERE IT IS CONTRARY TO THE EVIDENCE AND INHERENTLY ERRONEOUS.**

The argument of Respondents is to the effect that the Court will not correct errors of this kind on a petition for writ of certiorari. The Court has done so on many occasions.

Respectfully submitted,

JULIAN C. SIPPLE
26 Bryan Street, East,
Savannah, Georgia.

A. R. LAWTON,
26 Bryan Street, East,
Savannah, Georgia.

T. M. CUNNINGHAM,
26 Bryan Street, East,
Savannah, Georgia.

HERBERT P. REID,
76 Beaver Street,
New York, N. Y.

*Proctors for Petitioner.*

Dated:
February 19th, 1953.